

No. 15,524

United States Court of Appeals
For the Ninth Circuit

JAMES REESE,

Appellant,

vs.

HARLEY O. TEETS, Warden, California
State Prison, San Quentin, California,

Appellee.

APPELLEE'S BRIEF.

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Appellee.

APPELLEE'S BRIEF.

STATEMENT OF THE CASE.

On February 13, 1957, appellant filed a petition for writ of habeas corpus in the District Court. On February 14, 1957, the District Court denied the petition for writ of habeas corpus and denied a stay of execution. The District Court likewise denied a certificate of probable cause. The Chief Judge of this Court granted a certificate of probable cause on February 15, 1957 and ordered the execution scheduled for that date "stayed for thirty days and the prisoner's right to seek a further stay from the Supreme Court or a justice thereof is recognized."

STATEMENT OF THE FACTS.

Petitioner was convicted in the Superior Court of the City and County of San Francisco on seven counts; two counts of murder, one account of assault with intent to commit murder, three counts of burglary and one count of rape. The Superior Court imposed the death penalty on each of the two murder counts.

Automatic appeal was decided by the California Supreme Court on October 5, 1956 in an opinion reported as *People v. Reese*, 47 A.C. 107. On December 18, 1956, appellant filed a petition for writ of habeas corpus in the California Supreme Court. This petition contained the same allegations as the petition filed in the District Court. The California Supreme Court denied that petition on January 4, 1957.

Thereafter, and on March 11, 1957, the United States Supreme Court denied a stay of execution and a writ of certiorari, which sought review of both the affirmance of the judgments of the California Supreme Court and the denial of the writ of habeas corpus. See *Reese v. California*, 77 S.Ct. 597.

The petition filed in the District Court alleged three causes for relief: (1) That the court and the public defender, representing petitioner, conspired to deprive petitioner of a valid objection to evidence introduced in the trial; that the legality of the search and seizure of the petitioner's apartment was not raised and considered, due to the conspiracy of the public defender and the court; (2) that a certain defense witness was

not permitted to testify at petitioner's trial; and (3) that evidence of offenses of which he was not charged was introduced.

APPELLANT'S CONTENTIONS.

1. The introduction of evidence obtained by illegal search and seizure is a violation of the 14th Amendment.
 2. The introduction of evidence of other offenses in this case was a violation of the usual rule, and a violation of due process of law.
 3. The judge's instructions to the jury to the effect that if the jury should fix the penalty of death it should not specify the death penalty in the verdict, but simply return a verdict of guilty of murder in the first degree, was a violation of due process.
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SUMMARY OF APPELLEE'S ARGUMENT.

- I. The introduction of evidence obtained by an illegal search and seizure does not involve any constitutional problem.
- II. The introduction of evidence of other offenses and the instruction to the jury as to the wording of the verdict, are purely questions of State law and involve no Federal questions.
- III. The petition below contained no allegation of exhaustion of State remedies and therefore was insufficient under 28 U.S.C. § 2254.

IV. The allegations concerning conspiracy by the defense counsel and the court are insufficient, since such conclusory allegations in the State court are not in compliance with State procedural requirements; there has been no exhaustion of State remedies within the meaning of 28 U.S.C. § 2254.

ARGUMENT.

I.

THE INTRODUCTION OF EVIDENCE OBTAINED BY AN ILLEGAL SEARCH AND SEIZURE DOES NOT INVOLVE ANY CONSTITUTIONAL PROBLEM.

The introduction of evidence obtained by an illegal search and seizure does not involve any constitutional problem. *Wolf v. Colorado*, 338 U.S. 25; *Irvine v. California*, 347 U.S. 128.

II.

THE INTRODUCTION OF EVIDENCE OF OTHER OFFENSES AND THE INSTRUCTION TO THE JURY AS TO THE WORDING OF THE VERDICT, ARE PURELY QUESTIONS OF STATE LAW AND INVOLVE NO FEDERAL QUESTIONS.

The introduction of evidence of other offenses and the instruction to the jury as to the wording of the verdict, are purely questions of State law and involve no Federal questions. The question of the introduction of evidence of other offenses is a question of relevancy to be determined by the State courts. Further-

more, this question, to the extent it was not raised in the automatic appeal, has been waived. *In re Dixon*, 1 Cal. 2d 756.

Likewise, the question concerning the wording of the instructions to the jury regarding the effect of a first degree murder verdict without recommendation, is purely a question of State law. Furthermore, this question was not raised on the appeal in the California Supreme Court and has been waived. *In re Dixon*, 1 Cal. 2d 756.

III.

THE PETITION BELOW CONTAINED NO ALLEGATION OF EXHAUSTION OF STATE REMEDIES AND THEREFORE WAS INSUFFICIENT UNDER 28 U.S.C. § 2254.

The petition for habeas corpus filed in the District Court contained no allegation as to the exhaustion of State remedies nor did it allege facts which would constitute exceptional circumstances. The petition does not reveal that a petition for habeas corpus was filed in the California Supreme Court, or did it allege that a writ of certiorari had been sought in the U. S. Supreme Court from the affirmance of the judgment by the California Supreme Court, or from the denial of the writ of habeas corpus by the California Supreme Court. Thus, the District Court could properly have denied the petition on this ground. See 28 U.S.C. § 2254; *Darr v. Burford*, 339 U.S. 200; *Darcy v. Heinze*, 194 F.2d 664 (9th Cir. 1952); also see *Gordon v. Scudder*, 163 F.2d 518 (9th Cir. 1947).

IV.

THE ALLEGATIONS CONCERNING CONSPIRACY BY THE DEFENSE COUNSEL AND THE COURT ARE INSUFFICIENT, SINCE SUCH CONCLUSORY ALLEGATIONS IN THE STATE COURT ARE NOT IN COMPLIANCE WITH STATE PROCEDURAL REQUIREMENTS; THERE HAS BEEN NO EXHAUSTION OF STATE REMEDIES WITHIN THE MEANING OF 28 U.S.C. § 2254.

In the brief filed in this appeal, appellant raises no question of due process based on the conspiracy between the public defender and the court, as alleged in the petition filed in the District Court. Petitioner has, therefore, legally abandoned this contention and no response is required of the appellee on this question. However, out of an abundance of caution, appellee wishes to point out the legal insufficiency of the allegation concerning the conspiracy between defense counsel and the court.

Appellant's allegation concerning the conspiracy between defense counsel and the trial court is based on the theory that evidence was illegally obtained by the police, and that as a result of the conspiracy no objection was made to the introduction of this evidence in the State court. In the first place, such evidence was legally obtained as is indicated by the testimony in the State court, and no objection to the evidence could be properly sustained. See *People v. Roberts*, 47 A.C. 379.

The petition alleges in conclusory form as follows: "defendant argue[s] further that during his trial and on the automatic appeal; due to the conspiracy of the court and the public defender; they kept the question

f 'search and seizure' from coming up in his trial; and also the public defender refused to argue on the issue in defendant's automatic appeal."

It is the contention of the appellee that this allegation is insufficient to raise a due process question, since this allegation is almost identical to the allegation made in the State court, and such an allegation does not comply with the State procedural requirements. Such a failure to comply with State procedural requirements is a failure to exhaust State remedies within the meaning of 28 U.S.C. § 2254.

It is the position of appellee that appellant has not exhausted his State remedies because the petition filed by him in the State Court did not comply with the California procedural requirements. Appellant has not complied with the California procedural rules requiring that the petitioner for a writ of habeas corpus allege with particularity the facts upon which he relies to overturn the judgment; he has thus not properly sought to invoke the corrective process of the State of California. A petitioner cannot exhaust his State remedies by the simple expedient of wilfully or negligently failing to present a proper petition in the State court.

Petitioner's allegation, as set out above, was simply that the defense counsel and the court conspired to deprive him of a legal objection to certain testimony.

The California Supreme Court has set forth procedural rules requiring specific allegations of fact to establish a cause for relief. This rule does not require

any technical preciseness; it simply requires a frank disclosure of the facts. This rule requires one who seeks to show his conviction was obtained by a conspiracy to deprive the petitioner of a legal objection in the trial court, to specify the precise testimony which was illegally obtained. This rule requires petitioner to state in detail what the actual facts are, and name or otherwise identify the persons involved in the conspiracy, and state also the circumstances establishing such person's knowledge of the fact. Likewise, this rule requires a showing of the materiality of the matter subject to the legal objection. Also, it requires a petitioner to state the facts which establish that the petitioner did not have the opportunity to present the matters at the trial or on appeal, or at an early date. Stating this another way, the rule requires an explanation of the delay in raising the matter. See *In re Swain*, 34 Cal. 2d 300; *In re Razutis*, 35 Cal. 2d 532; *People v. Bronaugh*, 100 Cal.App. 2d 220, at 224.

The petition filed by petitioner in the California Supreme Court did not comply with these rules.

There are no allegations in the petition filed in the State court that showed the materiality of the matter subject to objection, the names of the persons involved in the conspiracy, the identity of the persons involved in the conspiracy, or in any detail what the actual facts were. Likewise, there is no allegation that petitioner did not know the facts concerning this conspiracy at the trial, and that thus he did not have an opportunity to present the truth at the trial. Likewise,

here is no explanation of the delay of a period of months before raising this matter.

The orderly, equal, and just administration of criminal law requires that petitioners be required to raise all objections at the earliest possible moment. He should not be permitted to reserve a case for later use.

The California Supreme Court, in the case of *In re Swain*, 34 Cal. 2d 300, at 303-304, sums up the rule and the justification for the rule as follows:

“ . . . (O)ur determination that the vague, conclusionary allegations in the present petition are insufficient to warrant issuance of the writ is not a ruling on the merits of the issues which petitioner has attempted to raise (citations omitted). We are entitled to and we do require of a convicted defendant that he allege with particularity the facts upon which he would have a final judgment overturned and that he fully disclose his reasons for delaying in the presentation of those facts. This procedural requirement does not place upon an indigent prisoner who seeks to raise questions of the denial of fundamental rights in propria persona any burden of complying with technicalities; it simply demands of him a measure of frankness in disclosing his factual situation.”

Until appellee has submitted a petition that conforms to the State procedural requirements, he has not exhausted his State remedies. No exceptional circumstances are alleged to obviate the necessity for exhaustion of State remedies. The petition was, therefore, properly dismissed.

Indeed, it is well settled that there can be no exhaustion of State remedies until there has been submitted a petition that conforms to State procedural requirements.

Buchanan v. O'Brien, 181 F.2d 601 (1st Cir., 1950);

Willis v. Utecht, 185 F.2d 810 (8th Cir., 1950);

United States ex rel. Calvin v. Cloudy, 95 F. Supp. 732 (D.C. N., 1951).

Dated, San Francisco, California,
June 12, 1957.

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